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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*UNITED STATES OF AMERICA *
*
* v. * CRIMINAL ACTION
* No. 11-10217-RGS-2
*
*
* RONALD MERRITT *
* * * * *

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING
September 7, 2012

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE, (By AUSA John A.
Wortmann, Jr.) 1 Courthouse Way, Suite 9000, Boston,
Massachusetts 02210, on behalf of the United States of
America

SINSHEIMER & ASSOCIATES, (By Robert S. Sinsheimer,
Esq.) 92 State Street, 9th Floor, Boston, Massachusetts
02109, on behalf of Ronald Merritt

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P R O C E E D I N G S

THE CLERK: All rise for this Honorable Court.

Court is open. You may be seated.

The Court calls Criminal Action No. 11-10217, United States of America versus Ronald Merritt.

Counsel, please identify yourself for the record.

MR. WORTMANN: Your Honor, good afternoon. John Wortmann for the United States.

MR. SINSHEIMER: Good afternoon, your Honor. Robert Sinsheimer for Mr. Merritt.

THE COURT: All right.

I, as have all counsel, and I assume Mr. Merritt, have reviewed the presentence report. I have the sentencing memorandum the government has filed, a lengthy sentencing memorandum, with a number of attachments to it, which I have reviewed, filed on behalf of Mr. Merritt.

Then there has been an exchange among counsel, and ultimately a reservation of the rights on defendant's behalf with respect to the Jamaica Plain crime laboratory, which I think none of us are in much of a position to assess what the impact is.

I have read the same material that you -- actually, some of the articles that I think, Mr. Sinsheimer, you've submitted or at least the newspaper-level account of what was happening at the lab.

1 I have no idea what this analyst was doing and what the
2 legal implications of it would be. I mean, I suppose this
3 is a little bit different than the Melendez-Diaz problem,
4 which is a constitutional issue. I don't think this is as
5 much a constitutional issue as the quality of what the error
6 or crime of commission, if it was, is. Were weights being
7 fabricated? Were chains of custody merely being improperly
8 vouched for?

9 I just have no idea from the information.

10 Perhaps you know more, Mr. Wortmann.

11 MR. WORTMANN: Your Honor, I wish I could tell you
12 that I did.

13 What I know is that there were some -- that the thing
14 got started when there were some -- there were protocols
15 regarding documentation that weren't being followed by this
16 particular chemist who, as far as I am aware of at this
17 moment, is at the center of all this. Her name is
18 Ms. Dookhan, and she was -- appears to have been, based on
19 the order on which the chemist signs certifications in this
20 case, appears to have been the primary chemist in this case.

21 So it started with that she was doing things -- she was
22 doing testing that was not in conformity with the protocols
23 regarding chain of custody issues.

24 And I hear rumors that it may involve a lot more than
25 that, but the problem is I don't know. I don't know whether

1 it's ultimately going to rise to the level of exhibits
2 being, in fact, sabotaged; and, if it does rise to that
3 level, how many are going to be involved and whether or not
4 it's going to be able to -- the system is going to be able
5 to differentiate those that were and those that weren't.

6 What I do know in this case is that the lab tends to
7 and, in fact, tests very few of the drug samples. In this
8 case there were, for example -- I think there were 30 bags
9 that were recovered from the transport vehicle with
10 Mr. Wilkins, and only a couple of those would be tested. So
11 the rest would be in the bags that they were originally in.

12 Now, in this case the bags that were sold to the
13 undercover by Mr. Wilkins and Mr. Merritt, that was tested.

14 The bag that Mr. Merritt had in his possession was
15 tested.

16 But I just -- as soon as we know anything more, we'll
17 obviously -- you know, I sent Mr. Sinsheimer an email on
18 Sunday when I realized, as I was starting to prepare for my
19 week, that Ms. Dookhan was involved in this case.

20 So I think we all share a common interest in getting to
21 the bottom of it, finding out how many cases are going to be
22 impacted, both from a standpoint of, you know, Is there any
23 effect, and, ultimately, Is there a substantive effect which
24 is going to have ramifications in terms of convictions? But
25 we don't know.

1 THE COURT: I mean, a range of issues could be
2 raised.

3 In a trafficking context, weight, of course, would be
4 important because that would drive the sentence. This is
5 not a trafficking case, so that wouldn't be relevant here.

6 If the analyst were saying something, say, is cocaine
7 when it's not, it would depend on the circumstances in which
8 the sale occurred; because, as I remember, representing a
9 substance to be a controlled substance, even if it's known
10 to be counterfeit to the person making the sale, is not a
11 defense to distribution. So, again, that would depend on
12 what was said or represented or could be inferred from what
13 happened at the time.

14 MR. WORTMANN: Correct.

15 THE COURT: If it's a chain of custody issue, I
16 think it would depend how egregious --

17 MR. WORTMANN: My office has made a commitment,
18 and, you know, I've been talking to Mr. Sinsheimer, and I've
19 made a commitment that, as we get information, we will
20 disseminate it, and we'll try to figure out a way to hash it
21 out. But I think that's as much as can be said right now.

22 THE COURT: Mr. Sinsheimer, I see you've taken a
23 very measured view in your memorandum. I am pretty much
24 going to have to defer to you. I don't know how quickly one
25 is going to know what the background of the investigation in

1 Jamaica Plain is. I am happy to defer the sentence, but I
2 think a release pending sentencing is not realistic under
3 the circumstances. But, again, it's, I think, more your
4 call at this point, because none of us --

5 It may be that the reservation of rights with respect
6 to your client is sufficient -- it would be in my mind -- to
7 protect his interests, but I cannot guarantee that there is
8 going to be an answer tomorrow or next week.

9 MR. SINSHEIMER: Right.

10 And as I understand the reservation of rights, as
11 Mr. Wortmann has agreed to it -- and I'm not putting words
12 in his mouth, if I'm mistaken, I'm sure he'll correct me --
13 but we've had discussions. We've tried to do this in as
14 good faith as could be possible given how little we know.

15 I mean, we start at the same place the Court starts.
16 We really don't know much.

17 My understanding is that Mr. Merritt, regardless of
18 what happens today, Mr. Merritt will have as much right
19 tomorrow as he would have had when Mr. Wortmann sent me an
20 email on Sunday -- which I read up in Vermont with the Globe
21 in front of me and the same minimal report that he had --
22 and that it's completely in our discretion if we want to
23 come in and move to vacate and move for a new trial at any
24 time.

25 And I would just leave it at that, because I think

1 that's as full and fair a reservation of rights as I could
2 be entitled to. I can't have more. He already pled guilty.
3 We know that.

4 Obviously, I wouldn't be here today asking for him to
5 be sentenced if it hadn't already been a plea.

6 THE COURT: No, I'm aware of that.

7 MR. SINSHEIMER: I know. I mean, but we're, you
8 know, four days or five days from sentencing.

9 I understood clearly what you said a moment ago about
10 release pending further discovery, if you want to call it
11 that, is perhaps not a likely option.

12 And having heard that from the Court, I, nonetheless,
13 want to express how important it is from my client's
14 perspective to, nonetheless, try to persuade you to let him
15 out of the whole case today. We're very, very serious about
16 that, no matter how unlikely it might appear.

17 But I'm not going to segue into that argument yet,
18 because I'm trying to address your immediate concern. I
19 only mention it to emphasize a factor in the decision
20 making. He has a right to go forward today, no matter how
21 unlikely it is that anyone is going to let him out today,
22 whether it be your Honor or -- whatever has been expressed.
23 He has a right today --

24 THE COURT: Or ultimately the Appeals Court.

25 MR. SINSHEIMER: Right, or ultimately the Appeals

1 Court, and that's a right he wants to pursue.

2 And so I don't really think I had a choice. Once the
3 government agreed to reserve his rights, that makes it easy,
4 from my perspective. He wants to pursue his right to seek
5 release today, and he wants to reserve his right to attack
6 the conviction, if it turns out there's a reason to do that.
7 And there probably is a reason to do that.

8 I mean, I don't want to sandbag anybody. There is
9 likely going to be further litigation about this, but I'm
10 not certain, and I want to wait until I see what the
11 government -- meaning in this case the United States -- is
12 going to come up with. And I think that's the best way to
13 proceed, and that's what I recommend; and, other than having
14 expanded on my memo, I think I'm really in the same place as
15 I was when I filed.

16 THE COURT: And from what you have said you have
17 discussed this fully with Mr. Merritt?

18 MR. SINSHEIMER: Absolutely.

19 MR. WORTMANN: Your Honor, if I could.

20 I think if Mr. Sinsheimer came in today and was seeking
21 relief, he would be seeking relief in the form of a motion
22 to vacate the guilty plea. And the standards applicable to
23 that are obviously different than the standards on a 2255.
24 And what we've discussed, and what I think is appropriate,
25 is that if, after the judgment, he comes forward and says, I

1 want relief, that that's the standard that the Court really
2 ought to apply, not the more rigorous standard under 2255,
3 but, rather, is there basis, is there a good cause, to
4 believe that the guilty plea should be vacated.

5 THE COURT: No. Ultimately we want justice to be
6 done.

7 MR. WORTMANN: Right.

8 THE COURT: I think that's in everybody's interest.

9 MR. WORTMANN: Exactly.

10 MR. SINSHEIMER: And the reason I wasn't using such
11 technical language is precisely because whatever rights
12 there might be as of before sentencing, that's what we're
13 entitled to, and I think it's been very clear.

14 THE COURT: Okay.

15 Mr. Wortmann, let's proceed then.

16 MR. SINSHEIMER: Can I just ask for the record, you
17 are, in fact, reserving his rights? I would like to hear
18 that from the bench.

19 THE COURT: Yes. I think I already said that once
20 before.

21 MR. SINSHEIMER: Oh, sorry.

22 THE COURT: And I think when I endorsed the motion
23 I said that I would agree with your proposal in that
24 respect. So the answer is "Yes."

25 MR. SINSHEIMER: Thank you.

1 MR. WORTMANN: Your Honor, thank you.

2 I think I'm going to do things a little bit backwards
3 today, because what I want to talk about at the outset is
4 the mitigators that were identified both in my sentencing
5 memorandum and Mr. Sinsheimer's sentencing memorandum
6 obviously in much greater detail.

7 And they're important starting places, just as the
8 starting place for the Guidelines that we could have been
9 starting at, of 188 months, had we filed the 851 and had we
10 required Mr. Merritt to plead to the 860 count, and what are
11 they?

12 Well, this case involved a small amount of drugs. I
13 freely acknowledge that. I recognize it. While that may or
14 may not have been a factor on a career offender case
15 pre-Booker, it is certainly something that you can take into
16 account afterwards, and it's something I took into account
17 in making the recommendation.

18 Mr. Merritt's role in the offense relative to that of
19 Mr. Wilkins, again, a factor that's completely unaccountable
20 for in the Guideline computations because the only
21 adjustment a career offender is entitled to is the
22 adjustment for acceptance of responsibility, which certainly
23 Mr. Merritt is entitled to here. But, again, your Honor, it
24 sort of wraps up into the nature of the offense of
25 conviction. And I took that into account because he was

1 meddling a deal. There was lesser involvement, and
2 Mr. Wilkins certainly had more drugs, a lot more drugs, on
3 him. But, you know, the undercover officer wanted 8 grams.

4 Third, his age, and I'm cognizant of the research that
5 Mr. Sinsheimer cited to you. I was cognizant of it at the
6 time. And 51 years old is certainly a time at which the
7 social scientists tell us that offenders are way past their
8 peak offending. But, your Honor, not this time.

9 Mr. Merritt -- this will be his eighth conviction since the
10 age of 40. And at the time that he committed the offense
11 here, he was on parole in one case that he had been violated
12 on, and had spend two years in custody, and he was on
13 pretrial release in another case. And, unfortunately, when
14 you look at the PSR, he hasn't slowed down.

15 And the need to avoid unwarranted disparities --
16 another concern of the government in every case. And, in
17 fact, one of the things that really drove my recommendation
18 here, but it wasn't to the disparities -- the supposed
19 disparities in the 27 cases that Mr. Sinsheimer cited to
20 you. I was the prosecutor in 21 of those cases, and I was
21 involved in the investigation on all 27, and what I can tell
22 you, your Honor, is that of the nine career-offender cases
23 that's included in that batch, the average sentence is 100
24 months, four months more than I'm asking you to impose on
25 Mr. Merritt here.

1 So the simple fact of the matter is that all legitimate
2 mitigating factors and all factors that were carefully
3 considered by me and by the U.S. Attorney's Office in,
4 first, allowing Mr. Merritt to plead down from 188 to 151,
5 and then moving from 151 to 96.

6 So what's left in this case?

7 And what's left is the 800-pound gorilla in the room,
8 which is Mr. Merritt's criminal record; and it was the thing
9 I focused on in the sentencing memo, the thing that drives
10 the sentence, both under the Guidelines and any other way
11 that you're going to look at the case. Sixteen convictions,
12 13 separate periods of incarceration, 25 years of almost
13 continuous criminal justice supervision, and continuing
14 right up to the day that he sold the drugs to the undercover
15 officer. Again, he was on parole and pretrial release,
16 crimes of violence, probation violations.

17 And Mr. Merritt for -- and if we only knew and we could
18 only say the reason was just a constant offender and
19 constantly engaging in the same type of conduct over and
20 over again.

21 So the only thing that can be left said is a theme that
22 I hear from time to time is that a lot of his more recent
23 cases, but not all of them, but a lot of his more recent
24 cases were related to domestic violence, and that those
25 cases are somehow less serious.

1 And, your Honor, I start by saying that only people who
2 have not experienced domestic violence firsthand are in a
3 position to say that, because the damage that it inflicts on
4 spouses, on families, and on children, you know, just
5 couldn't be clearer. But what's even clearer here is the
6 specifics of Mr. Merritt's abuse of women, and the facts of
7 some of those cases, which really deserve careful
8 consideration by the Court because they show that these
9 cases really are serious, and they really have done damage
10 to people, and it really is a serious record. And a
11 96-month sentence is ultimately something that I consider to
12 be a lenient recommendation, and I made it principally
13 because I found Mr. Wilkins and Mr. Merritt, at the end of
14 the day, looking at the totality of the two of them, to be
15 indistinguishable, and I couldn't justify in my own mind a
16 higher sentence.

17 But let's look at just a couple of them, and I am
18 reading, first, from Paragraph 48, and these are all
19 unobjected to Descriptions of the Offenses, and that's in
20 1994 when Mr. Merritt was 33 years old.

21 "On November 22, 1994, Robin LeShore reported that her
22 boyfriend, the defendant, whom she had an active restraining
23 order against" -- a theme that's repeated over and over and
24 over again -- "had telephoned or had made statements that he
25 was going to kill her. He arrived at the apartment, kicked

1 in the door, entered the home and pushed her to the floor.
2 He proceeded to repeatedly punch her in the head and kick
3 her."

4 The next one, Paragraph 53, 2002, Age 40. "On April
5 13, 2002, the victim, Nadeera Codero, informed officers that
6 the defendant had come to her apartment insisting that she
7 attend a funeral with him. When she refused, the defendant
8 became angry and demanded that she return jewelry and a
9 computer he had given her. He then grabbed her by the arm,
10 pushed her against the wall and grabbed her throat. He
11 pulled out a small knife and threatened to kill her. As the
12 victim struggled to get away from the defendant, she was cut
13 on her right arm. He fled from the apartment and returned
14 banging on the door while threatening to harm the victim and
15 her daughter. The defendant was able to push the door, but
16 fled when he learned the victim had called 911."

17 Five months later, same victim, she "informed officers
18 that she and her boyfriend, the defendant, got into an
19 argument while riding in a truck. She attempted to exit the
20 vehicle because the defendant was being verbally abusive to
21 her. The defendant pulled her by the hair, grabbed her, and
22 pushed her repeatedly until she fell out of the vehicle.
23 She tried to defend herself by biting the defendant."

24 Lastly, 2008, Age 47, and this is on an offense of
25 intimidation of a witness, a violation of an Abuse

1 Prevention Order, that, "Nadeera Merritt informed police
2 officers that she had been receiving harassing and
3 threatening phone calls from the defendant, her estranged
4 husband, whom she had an active restraining order against.
5 She stated that the defendant was intimidating her and
6 threatening physical harm to her if she did not remove this
7 restraining order. During her conversation with police
8 officers, the defendant called her cellular telephone five
9 times."

10 And, your Honor, you know, if there was a magic button
11 that I could push and help Mr. Merritt to deal with his
12 temper and to deal with the abuse that he has imposed on
13 others in his life, I would do it. The simple fact is I
14 don't know what that button is.

15 What I do know is that everything the criminal justice
16 system has tried to do with him has been an abject failure
17 with respect to his repeated abuse of those around him, you
18 know, the threats, the physical abuse. And this is a really
19 serious record, and it's a record that's -- here's a man who
20 has been in court literally dozens and dozens of times, who
21 has been to, you know, every prison at every level, has had
22 sentences of 3 to 7 years, has spent 10 to 15 years of his
23 life in prison. And, again, he gets out -- he's two weeks
24 out of a halfway house, he's already on pretrial release for
25 one case, he's still on parole -- and he's selling drugs.

1 Your Honor, this is a case that calls out -- the 96
2 months is a very reasonable, very appropriate sentence, and
3 I ask your Honor to impose it for all those reasons.

4 I ask your Honor also to impose five years of
5 supervised release.

6 I ask that we get Mr. Merritt every possible help that
7 we can get with respect to anger management, with respect to
8 batterers' classes. I'll join in a recommendation for the
9 500-Hour Drug Treatment Program. Unfortunately, Mr. Merritt
10 has demonstrated that he is not going -- he hasn't finished
11 yet, and he needs to be incarcerated for a substantial
12 period of time both for his protection and for the
13 protection of the people around him.

14 THE COURT: Thank you, Mr. Wortmann.
15 Mr. Sinsheimer.

16 MR. SINSHEIMER: Thank you, your Honor.

17 Your Honor, before I start talking, would you be kind
18 enough to review Paragraph 127 of the presentence report,
19 please.

20 THE COURT: 127?

21 MR. SINSHEIMER: The last paragraph on page 32.

22 (Pause in proceedings.)

23 THE COURT: Yes.

24 MR. SINSHEIMER: And notice that by February 2001
25 the defendant was on track to secure custody of his

1 children.

2 Despite everything that my brother said about the
3 history of alleged, and sometimes admitted, domestic
4 violence, I want to make sure, your Honor, if you will allow
5 a personal digression, that you know that no one takes
6 domestic violence more seriously than I do. And I am proud
7 that there is a decision, Commonwealth v. Atkinson, in 2011
8 from the Massachusetts Appeals Court where we protected the
9 rights of battered women in the criminal justice system.
10 It's one of my best days in 30 years at the bar.

11 Forgive a personal digression. The reason for it is so
12 that if I accidentally denigrate the importance of domestic
13 violence in order to get us out of here by three o'clock,
14 that's not intentional. We will never forget that that is,
15 in fact, a serious matter.

16 It doesn't change the key question. My brother's right
17 that there's an 800-pound gorilla in the room, but the
18 question is: Is that gorilla really the appropriate thing
19 to be looking at in federal sentencing of an individual
20 after Booker? If you look at the whole person, you're not
21 discounting domestic violence to give him another chance.
22 You're, in fact, protecting him and society and doing the
23 right thing by his children.

24 Now, there are actually four reasons why the sentence
25 should be far, far, far below the Guidelines, but why

1 anything above what we say, time served but a couple of
2 years, is truly unreasonable on a human -- as a matter of
3 humanity, I suggest.

4 Here they are: Number One -- and I'm not talking
5 about technical guidelines, your honor. I'm just talking
6 about the humanity.

7 Number One is the de minimis nature of the offense
8 itself. That's conceded. I'm talking about this offense.

9 Number Two is his age, and the age is conceded in the
10 sense that Mr. Wortmann acknowledges it's an important
11 factor in considering recidivism. I don't think he gives it
12 the full weight, and I'll come back to that. I'm just
13 listing the factors.

14 One, de minimis nature; two, age.

15 Three, and Mr. Wortmann hardly mentioned this at all,
16 Mr. Merritt is an active father of two young children who
17 still have a chance to grow up with a father who cares about
18 them and loves them, who a court would allow him to remain
19 in custody of, and he -- and whose lives are now being
20 protected by his, Mr. Merritt's, sister.

21 And I want to make clear about that, because the
22 paragraph I asked you to look, which is, "Given his
23 detention, given that his wife's whereabouts are unknown,
24 the children were placed in their aunt's custody." Their
25 aunt is his sister, who lives in his home. And that's

1 stated elsewhere in the presentence report.

2 And, finally, another matter that Mr. Wortmann didn't
3 even mention at all, and that is -- and I don't think he --
4 if I'm mistaken, fine, but I don't think he even mentioned
5 it, that is Mr. Merritt's propensity to always seek gainful
6 employment.

7 And I would ask your Honor briefly to take a quick look
8 at Paragraph 155 on the bottom of page 35.

9 (Pause in proceedings.)

10 THE COURT: Well, I've read 155 but also 156, which
11 is just as important.

12 MR. SINSHEIMER: Even more so, and you're
13 absolutely right.

14 Mr. Merritt has made an enormous number of mistakes in
15 his life, and he clearly needs better education with respect
16 to the issue of domestic violence. I fully support the
17 government's recommendation that whenever he gets out he be
18 involved in programs. We had talked about the CARE and
19 RESTART programs, but there might be better programs.

20 The other thing, your Honor -- I mean, I'm not going to
21 repeat all the material that we sent to you. But the other
22 thing is if you look at how well he's done while he's been
23 incarcerated already -- that's our Exhibit A -- it's very,
24 very clear that he's tried really hard while he has been in
25 jail.

1 So you take those four factors. I think when you look
2 at them all together, the way to really sentence Mr. Merritt
3 is to ask yourself this question: If I were not sentencing
4 him on the domestic violence, what kind of sentence would he
5 really have? And then see if, despite that, you could find
6 it in your heart to give him one more chance in the hope
7 that perhaps he would not be a batterer anymore.

8 And I think the answer to the first part is easy. No
9 one really would want substantial incarceration more than
10 he's already served for the de minimis nature of this
11 offense. And I don't think Mr. Wortmann would.

12 So we really have to look at how a certain kind of
13 activity should be dealt with by a justice in the federal
14 system when the choice is to take a father, who wants to
15 work, away from his children. And what I say, your Honor,
16 is the way in which our society combats the cycle of
17 violence is to have dads who are good role models living in
18 parts of our world where their may be less fathers.

19 Mr. Merritt is proud, as you pointed out in 156, that
20 he has a father who's taught him to work hard. He may have
21 also had a father that taught him the virtues of tough love.
22 Maybe in 2012 tough love isn't the right way to proceed in
23 life, and there needs to be better education about that
24 issue.

25 Again, that's not an issue that the federal system is

1 best equipped to deal with. That's an issue that should be
2 dealt with at the street level and at the state level and by
3 the Massachusetts Probate Court, which has already awarded
4 him custody of his children.

5 And I am being careful not to denigrate Mrs. Merritt,
6 but there's a reason for that, and it's in the presentence
7 report. She is not an able mom. So the chance for these
8 people to have a role model, these young children, Mike and
9 Victoria, the chance is if your Honor can find it in your
10 heart to say, Despite this issue that's been out there, this
11 man, at this age, deserves a chance to be a dad because he
12 is a hard worker, because every other aspect of his life
13 shows that society would be better off giving him a chance
14 to be a father, letting him get domestic violence treatment.

15 By the way, he's not in the home now. So at least if
16 you were to let him out today he would be living in the home
17 with his sister. He would be living in a situation where he
18 has a chance to rebuild a life.

19 The reality is, as far from the Guidelines as it might
20 seem, if your Honor let him out today, he would go back,
21 live in his parents' home where his sister is serving as a
22 surrogate mom, go out and earn money, and be able to support
23 the children and show them that a man, even at the age of
24 51, gets up the morning, goes to work, brings home the
25 bacon -- if you'll pardon the age-old cliché -- and accepts

1 responsibility.

2 He would also have to accept responsibility for his
3 mistakes and participate in the battered-women or
4 anger-management kinds of programs.

5 Your Honor, we submitted a lot of materials, so I won't
6 belabor it, but I am happy to answer any questions.

7 As odd as it may seem, I do push hard, your Honor, to
8 give him a chance to go back into the community.

9 If you lock him up for eight years, like they're asking
10 for, he's going to be almost 60, and his kids are going to
11 be college age. And if you put him out there now, he has
12 the chance to do the right thing. They have a chance to
13 have a dad, and I really don't see how society is harmed.

14 THE COURT: The material that you submitted I'm
15 familiar with. What is surprising in Mr. Merritt's case is
16 that he still is involved with crime at his age. Generally,
17 studies show that by the late 20s, most people who are going
18 to find another life do so at that point. Often it's
19 because of marriage or sometimes, I suppose, the thrill is
20 lost of taking the kind of risk that crime entails. But I
21 did find the material, even though it was not new to me --
22 some of it was in the specifics, but the general thrust of
23 the material I'm familiar with and have been for a long
24 time. It's one of the things that always has puzzled not
25 just judges but, I think, criminologists in trying to

1 understand what drives people into crime.

2 Mr. Merritt, a lot has been said about you, but this is
3 your opportunity to speak for yourself if you wish. You're
4 not, obviously, required to, but you have a right to.

5 THE DEFENDANT: I will try.

6 THE COURT: Okay.

7 THE DEFENDANT: I understand I have a very bad
8 criminal record, and a lot of it has to do with family
9 issues. Every time I get out, I do try my best to do the
10 right thing. This time I relapsed using drugs. I got
11 involved with a terrible thing.

12 I was on my way to getting my children back, and there
13 was a lot of pressure on me while I was released, as far as
14 going to parenting classes, taking my children to school,
15 going to their therapist, doing AA meetings. It all just
16 came down on me and I relapsed. But this time I think
17 things are going to be different. I have two children that
18 need me and actually come visit me. They even wish that
19 their mother was in there and I was out, which shocked me,
20 and it just -- that made me realize how much those children
21 really do need me. And hopefully, when I do get out, this
22 never happen again.

23 I understand that if I come into these courtrooms
24 again -- any courtroom, I'm looking at a lot of trouble, and
25 I do understand that.

1 I'm asking you, your Honor, to just give me a chance.
2 I will do whatever it takes just to be with my children and
3 my family.

4 My mother's getting old now. She's very old. She's on
5 dialysis. I do a lot of work for them. That's also a
6 burden on me, too, doing a whole lot of chores and stuff for
7 them. I was working at five o'clock in the morning. I
8 didn't get out until six o'clock, which is -- it was too
9 much for me, and I relapsed after 15 years.

10 That's what happened.

11 (Whereupon, the defendant breaks down.)

12 THE COURT: Why don't we just take a minute.

13 (Pause in proceedings.)

14 THE COURT: No case is easy, and this is a more
15 difficult case than most.

16 I think on the mitigating side, Mr. Sinsheimer has
17 pointed to all the right factors. The age of the defendant
18 being significant, but most probably, however, is the de
19 minimis nature of the offense. It is a very small drug
20 sale, and I am sensitive to the fact that if we were not
21 looking at the career criminal history category, we would be
22 talking about a sentence that would be well within the range
23 that Mr. Sinsheimer is recommending, if not, indeed, below
24 what the defendant has already served.

25 On the other hand, I am also sensitive to the fact that

1 this is one of those cases where it is not a statutory
2 scheme that is driving the criminal history categorization,
3 it's actually the number of convictions, which add up, even
4 though some of them show a consistent pattern of domestic
5 relationships and strains within that relationship and
6 abuses involving the same victim, as best as I can tell from
7 most of the convictions and the number of the offenses
8 reported that did not result in conviction, we still have 26
9 criminal history category points, which is twice what the
10 Sentencing Commission envisioned as the most serious record
11 that they could imagine.

12 So I cannot put aside the criminal history.

13 I am also sensitive to the fact that when we began this
14 case we were talking about a 188-month minimum sentence.
15 That then was reduced to 151 on the basis of the plea. The
16 government further reduces the recommendation, I think for
17 very good reasons that Mr. Wortmann expressed, to 96 months.

18 I am willing to go a lit bit further. I accept the
19 Sentencing Guidelines. I can see reasons why, perhaps, they
20 overstate the appropriate sentence that ought to be imposed.
21 But, again, taking the prior record into account, I am
22 willing to adjust the Guideline range down to a Level 22 and
23 an 84-month sentence, which is the sentence that I will
24 impose.

25 Mr. Merritt is obviously a very good citizen in a

1 structured institutional setting. He does fine. It's being
2 put under the stress, I think, of a domestic situation. I
3 understand children can be an enormous toll and enormous
4 pressure, and I'm sure at the heart, as best I can tell from
5 a cold record and description, that tension over the
6 upbringing of the children probably lies at much -- it does
7 not excuse it, but lies in an explanatory way at the heart
8 of a number of the domestic violence convictions.

9 I don't know.

10 Mr. Wortmann, you might see it differently, but that's
11 the way I thought I had read the record.

12 But while I realize it's a harsher sentence than the
13 crime itself would warrant, I think I have to take the
14 entire picture into account, and I think this is the
15 appropriate sentence to impose.

16 I will also impose the five years of supervised release
17 in the hopes that this, indeed, is the last best opportunity
18 that we have for Mr. Merritt to change his life.

19 Mr. Merritt, would you stand please.

20 This is, of course, subject to the reservation of
21 rights that the Court has acknowledged.

22 Mr. Merritt, pursuant to the Sentencing Reform Act,
23 and, more particularly, having considered the sentencing
24 factors enumerated at 18, United States Code,
25 Section 3553(a), it is the judgment of the Court that you be

1 committed to the custody of the Bureau of Prisons for a term
2 of 84 months.

3 It is my understanding that you will be credited for
4 time served since April 23, 2011, when, I believe, the
5 arrest on the related state charge resulted in custody.

6 The Court will make a judicial recommendation that you
7 participate in substance abuse treatment while in the
8 custody of the Bureau of Prisons.

9 Upon release from custody, you will placed on
10 supervised release for a term of five years.

11 Within 72 hours of release from custody, you must
12 report in person to the district to which you are released,
13 which will be the District of Massachusetts, with reasonable
14 certainty.

15 The Court will not impose a fine. Obviously, you have
16 no capacity to pay a fine.

17 While on supervised release you will comply with the
18 following terms and conditions: You will comply with the
19 standard conditions that have been adopted by the court.
20 These are described at United States Sentencing Guidelines,
21 Section 5D1.3(c). They will be set forth in writing in the
22 Judgment.

23 You will not commit, of course, any federal, state or
24 local crime, nor will you illegally possess a controlled
25 substance.

1 You will refrain from any unlawful use of a controlled
2 substance. You must submit to one drug test within 15 days
3 of release from custody and at least two periodic drug tests
4 thereafter, not to exceed 104 tests per year, as directed by
5 the Probation Office.

6 By law you are required to submit to the collection of
7 a DNA sample, again, as directed by the Probation Office.

8 The Court will impose the following special conditions:
9 You are prohibited from possessing a firearm, destructive
10 device, or other dangerous weapon.

11 You will participate in a program for substance abuse
12 counseling as directed by the United States Probation
13 Office, subject to the drug-testing conditions I previously
14 imposed.

15 You will be required to contribute to the cost of
16 services for such treatment based on your ability to pay or
17 the availability of a third-party payor.

18 You will not consume alcoholic beverages.

19 You will participate in a certified Batterers
20 Intervention Program with an anger management component,
21 again, as directed by the Probation Office, subject to the
22 potential requirement that you pay for the cost of such
23 services.

24 You will further participate in an educational service
25 program as directed by the Probation Office. My hope is

1 that you will -- I believe you are still working on your
2 GED, but this is something that you will accomplish before
3 sentence has expired. If not, I will make that a condition
4 of supervised release.

5 Finally, it is ordered that you pay to the United
6 States a special assessment of \$100. That will be due, by
7 operation of law, immediately.

8 You are entitled to take an appeal. That may very well
9 depend on circumstances, as we learn them, regarding the
10 drug in question and the manner in which it was handled by
11 the State Laboratory, but I will instruct the Clerk to
12 advise you of the right of appeal.

13 THE CLERK: Mr. Merritt, you have the right to file
14 a Notice of Appeal in this case. If you do wish to file a
15 Notice of Appeal, you must file it within 14 days from the
16 date in which I enter the judgment. If you cannot afford an
17 attorney to file the appeal on your behalf, you may request
18 me to do it, and I will file it in the Clerk's Office for
19 you.

20 THE COURT: Mr. Merritt, this is not something I
21 would ever, I think, say to someone with a record as long as
22 yours, but, despite that record, I think you have a lot of
23 good in you. I do think you really are devoted to your
24 children, and I think that you are important to their lives.

25 I think if you could just absorb some of the lessons

1 that --

2 THE DEFENDANT: Part of it, I left out, is my wife
3 is disabled.

4 THE COURT: I realize you've labored with a lot,
5 and in the right setting you do just fine. You show a lot
6 of capacity for good. It's just that drugs, I realize, have
7 been a serious disability in your life.

8 Anger, you know, is another one, and those two, when
9 fueled by, sometimes, alcohol as well, I mean, is what
10 really has put your life off the rail.

11 But this is not the longest sentence that could have
12 been imposed. It's probably well under what would have been
13 imposed if we stayed where we began with this case, and I
14 think it does give you a chance to pull your life together.
15 I think you actually have the capacity to do it, and my hope
16 is that I won't see you again, at least in circumstances
17 like this.

18 THE DEFENDANT: No.

19 THE COURT: All right.

20 Thank you very much, counsel.

21 MR. SINSHEIMER: Judge, may I raise one thing
22 quickly?

23 I'm concerned about the 14-day period while the
24 reservation of rights is also out there. Is there any way
25 you can stay entry of the judgment just --

1 THE COURT: I'm not sure that the entry of judgment
2 would affect anything. My concern is if I don't enter
3 judgment, then he stays in state custody.

4 MR. SINSHEIMER: I guess I should ask you also if
5 you could recommend he be as close to Massachusetts as
6 possible.

7 THE COURT: I'm happy to do that, but my thought is
8 he is going to get a lot more benefit out of getting into a
9 treatment program --

10 MR. SINSHEIMER: I agree.

11 THE COURT: -- in a federal facility.

12 MR. SINSHEIMER: Let me talk to Mr. Wortmann. I'm
13 sorry for not thinking this through.

14 THE COURT: Talk to him. If there is something I'm
15 missing -- but what I would do is file a Protective Notice
16 of Appeal, which will then operate as soon as the Judgment
17 enters, to ensure that whatever rights are preserved, in
18 fact, remain preserved.

19 Okay.

20 MR. SINSHEIMER: Thank you.

21 THE COURT: All right.

22 THE CLERK: All rise.

23 (Proceedings adjourned.)
24
25

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons

March 7, 2012

James P. Gibbons

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